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COURT OF THE UNITED STATES

October Term 1980

No. 80-1973

Y D. HOPSON
RD C. OLDHAM
LES H. ANDERSON
H NICHOLSON and
E H. KUNZMAN - - Petitioners

IERS OF THE SINKING FUND
ITY OF LOUISVILLE - Respondent

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etition for a Writ of Certiorari to the
Court of Appeals of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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ondent has raised several arguments in
pposition which merit reply:
pondent suggests that there is no substan-
estion presented and that "it is, of course,
ed law that the appellate courts of the
ltimate arbiters as to whether a state stat-
dinance is valid under the constitution of
ohen v. *Beneficial Industrial Loan Corp.*,
(1949). Furthermore, Respondent sug-
his court is bound by the holding of the
rts that Louisville and Jefferson County
under the Kentucky constitution impose

their general occupational license taxes on the Petitioners." [Respondent's Brief, p. 7.]

We submit that this Court is not bound by the holding of the Kentucky courts since the tax imposed by General Ordinance No. 727 amounts to a taking of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. While it is true that a state appellate court is the ultimate arbiter as to whether or not a state or local ordinance is valid under the constitution of that state, it is also true that federal constitutional questions must be considered by this Court.

> Federal constitutional questions we must consider, because a federal court would not give effect, in either a diversity or non-diversity case, to a state statute that violates the Constitution of the United States. *Cohen, Id.,* at 337 U. S. 547.

Secondly, Respondent suggests that this Court is without jurisdiction to hear this case since no federal questions were properly raised in the state court proceedings below. "This court will not decide issues which are raised on review of state court proceedings for the first time before this court. *Tacon* v. *Arizona,* 410 U. S. 351 (1973)." [Respondent's Brief, p. 8]

We submit that the due process question was properly raised in all of the state courts below since it has been our contention from the outset that the Respondent is without authority to impose an occupation or license tax on the Petitioner's constitutionally mandated job of conducting circuit court in their city. The exaction of this tax is a taking of property without

due process of law in violation of the Fourteenth Amendment of the United States Constitution. This Court has long recognized that no particular form of words or phrases is essential to draw in question the constitutionality of a state's statute.

> Insofar as the question of sufficient presentation is one for independent decision, the controlling principle was set forth in a leading case of *New York ex rel, Bryant* v. *Zimmerman,* 278 U. S. 63, 67, 73 L. Ed. 184, 187, 49 S. Ct. 61, 62 A.L.R. 785 (1928);
>
> "There are various ways in which the validity of a state statute may be drawn in question on the grounds that it is repugnant to the Constitution of the United States. *No particular form of words or phrases is essential,* but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. *And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.*" [Emphasis added.] *Street* v. *New York,* 394 U. S. 576, 584, 22 L. Ed. 2d 572, 580, 89 S. Ct. 1354 (1969).

It cannot be doubted from the record as a whole that the clear intendment of the Petitioners' argument is that the tax imposed by General Ordinance 727 is violative of the Petitioner's right to due process of law since it places a tax on the privilege of engaging in an occupation which has been constitutionally mandated by the Commonwealth of Kentucky. Thus, the issue

of due process of law was properly raised in the courts below.

We submit that this Court could still maintain jurisdiction even if the constitutional issue had not been properly raised in the courts below. This Court has long recognized the principle that a reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. *United Brotherhood* v. *United States,* 330 U. S. 395, 91 L. Ed. 973, 67 S. Ct. 775 (1947). This court makes exceptions to its rule against consideration of questions not raised by the parties in view of the *importance of the question involved* or of *public concern,* or *in the interest of justice.* See *United States* v. *Western P.R. Co.,* 352 U. S. 59, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956), *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971). We submit that this case is of a continuing public concern since the issues involved affect the very independence of the judiciary system. It is, therefore, within this Court's authority to consider the due process of law question even if it had not been raised in the lower courts.

Finally, Respondent suggests that "of all citizens, judges should be among the first to shoulder their fair share of supporting local government and schools." [Respondent's Brief in Opposition, p. 11.] As authority for this principle the Respondent cites *Martin* v. *Wolford,* 269 Ky. 411, 107 S. W. 2d 267 (1937) and a dissertation by Justice Frankfurter in *O'Malley* v.

Woodrough, 307 U. S. 277 (1939) concerning this Court's decision to uphold a state statute imposing federal income tax on federal judges.

We submit that the Respondent has erroneously attempted to akin the payment of an occupational license tax to the constitutional duty to pay income tax. Petitioners agree that they should shoulder their fair share of support for local government and schools by paying state income tax. Petitioners have never argued that they should not pay state or federal income tax. Petitioners are simply stating that they should not have to pay an occupational or license tax for the privilege of engaging in an occupation that has been mandated by the Constitution of the Commonwealth of Kentucky. Payment of income tax has absolutely nothing to do with this case and, hence, Respondent's reliance upon *O'Malley* and *Martin* is misplaced.

In conclusion, Petitioners respectfully request this Court to grant the Writ of Certiorari in order to resolve an issue of great public concern to both the citizens and the Judiciary of the Commonwealth of Kentucky.

Respectfully submitted,

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